

FILED

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Case No. 83-977

LOUIE L. WAINWRIGHT, Florida
Department of Corrections

Petitioner,

vs.

JOHN HUDGINS,
#045861

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below conflicts with decisions of this Court requiring the exhaustion of state judicial remedies.

2. Whether the federal constitutional standard to establish double jeopardy in violation of the Fifth Amendment is similar to Florida's 'single transaction rule', so as to permit the district court to consider the respondent's claim as one involving double jeopardy.

3. Whether respondent's dual sentence for aggravated battery and for possession of a firearm while engaged in a criminal offense violates the Fifth Amendment prohibition against double jeopardy.

4. Whether the decision below conflicts with decisions of this Court which hold that challenges to the state court's

application of its own laws or rules does not state a basis for federal habeas corpus relief.

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REASONS FOR GRANTING WRIT

3. WHETHER RESPONDENT'S DUAL SENTENCE FOR AGGRAVATED BATTERY AND FOR POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

Petitioner takes the position that aggravated battery and possession of a firearm during the commission of a criminal offense are sufficiently distinguishable under Blockburger v. United States, 284 U.S. 299 (1932) to permit the imposition of separate sentences. Contrary to respondent's contention, the State has not completely reversed its position before this Court.

In its Initial Brief before the Eleventh Circuit Court of Appeals, the State argued alternatively that Hegstrom

v. State, 401 So.2d 1343 (Fla. 1981), a then recent decision of the Florida Supreme Court, may have created for the petitioner a new basis for relief. The State said:

For the reasons stated in Hergstrom, it appears that Hudgins may have a newly created basis for relief in the state court pursuant to Fla.R.Crim.P. 3.850. On the authority of Canet [v. Turner 606 F.2d 89 (5th Cir. 1979)], and other cases cited in connection therewith, this Court should abstain from exercising its jurisdiction to allow the state court an opportunity to reconsider its previous ruling in light of subsequent Supreme Court decisions resulting in substantive changes in state law. The proper remedy would be to dismiss the petition without prejudice to allow Hudgins an opportunity to take advantage of a newly created basis for relief in the state trial court.

State's Initial Brief,
Eleventh Circuit Court
Of Appeals, at page 24.

In State v. Hegstrom, supra, the Supreme Court of Florida concluded that whether separate judgments and sentences would be permissible for separate offenses arising out of the same criminal episode was dependent upon legislative intent. The court then looked to sec. 775.021 (4), Fla. Stats. (1979) and decided that the underlying felony in a felony-murder situation was a "lesser included offense" of the felony murder. The court concluded that Hegstrom could not be sentenced both for felony murder and for the underlying felony. Id. at 1346. The court did not use the Blockburger test to determine what was a "lesser included offense," but instead looked at the charging document and the evidence adduced at trial.

However, the law still was not resolved. In Borges v. State, 415 So.2d 1265 (Fla. 1982), the Florida Supreme Court found that the single transaction rule had been repudiated by sec. 775.021 (4), Fla. Stat., and upheld separate judgments and sentences for the crimes of burglary while armed with a dangerous weapon, possession of burglary tools, possession of a firearm by a convicted felon, and carrying a concealed firearm. Significantly, the court applied the Blockburger test to achieve this result.

Borges was followed by State v. Carpenter, 417 So.2d 986 (Fla. 1982), in which the Supreme Court of Florida clearly stated that in using the Blockburger test "the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial

or the facts as alleged in a particular information." Id. at 988.

After Carpenter, the law in Florida was clear that separate sentences for different offenses arising out of the same criminal transaction were permissible as long as double jeopardy was not involved. Double jeopardy was not involved if after applying the Blockburger test by looking at the statutory elements, rather than the charging document or evidence adduced at trial, each offense required proof of a fact which the other did not.

The Hegstrom-type analysis is, therefore, no longer applicable in light of Borges and Carpenter. The Florida Supreme Court recently distinguished Hegstrom and upheld separate sentences for murder in the first degree and use

of a firearm in the commission of a felony. Teffeteller v. State, 439 So.2d 840, 847 (Fla. 1983).

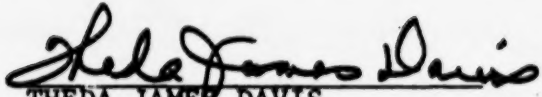
As Florida case law now stands, the crimes for which petitioner was convicted and sentenced - - aggravated battery and possession of a firearm while engaged in a criminal offense - - are sufficiently distinguishable under the Blockburger test to permit the imposition of separate sentences. Teffeteller v. State, supra; State v. Carpenter, supra; Borges v. State, supra.

CONCLUSION

For the reasons set forth in this brief as well as the initial brief, petitioner respectfully urges this Court to grant Certiorari and reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

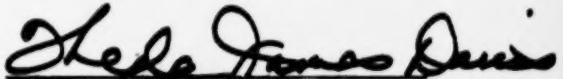
A handwritten signature in cursive script, reading "Theda James Davis". The signature is written in dark ink and is positioned above the printed name.

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CERTIFICATE OF SERVICE

I, Theda James Davis, Counsel for
Petitioner, and a member of the Bar of
the United States, hereby certify that
on the 26th day of March, 1984, I served
three copies of the Reply Brief of
Petitioner by U.S. Regular Mail to:
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